UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--x

WAUSAU UNDERWRITERS INSURANCE COMPANY,

Plaintiff,

-against-

OLD REPUBLIC GENERAL INSURANCE COMPANY,

Defendant.

--x

Civil Action No.
14 Civ. 3019 (JMF)(HBP)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF WAUSAU UNDERWRITERS INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

Jaffe & Asher LLP
Attorneys for Plaintiff
WAUSAU UNDERWRITERS INSURANCE COMPANY
600 Third Avenue
New York, New York 10016
(212) 687-3000

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PRELIMINARY STATEMENT

Plaintiff WAUSAU UNDERWRITERS INSURANCE COMPANY ("Wausau") submits this memorandum of law in support of its motion for an Order, pursuant to Fed. R. Civ. P. 56, granting summary judgment in favor of Wausau and against defendant OLD REPUBLIC GENERAL INSURANCE COMPANY ("Old Republic"), as follows: (1) determining and declaring that Old Republic is required to defend and indemnify Carlyle Partners II, LLP ("Carlyle") and 170 Broadway NYC LP ("170 Broadway") for the action entitled Adam Burawski v. 170 Broadway NYC LP, Carlyle Development Group LLC, Carlyle Partners II, LP, and McGowan Builders, Inc., Index No. 154637/13, pending in the Supreme Court of the State of New York, County of New York (the "Underlying Action"); (2) determining and declaring that Old Republic's coverage for Carlyle and 170 Broadway applies on a primary basis as compared to Wausau's policy; (3) awarding Wausau a money judgment against Old Republic in the sum of $9,898.70, plus interest from April 1, 2014 (an intermediate for the invoices); and (4) granting Wausau such other and further relief as which this Court deems just and proper, together with the costs and disbursements of the instant action.

Carlyle and 170 Broadway qualify as additional insureds for the claims alleged in the Underlying Action under the Commercial General Liability policy, No. A-2CG-457112-05, with a policy period from August 12, 2012 to August 12, 2013, Old Republic issued to McGowan Builders, Inc. ("McGowan") as the Named Insured (the "Old Republic Policy"). There are two separate additional insured endorsements to the Old Republic Policy under which Carlyle and 170 Broadway qualify as additional insureds.

The first endorsement applies "WHERE REQUIRED BY WRITTEN CONTRACT" to "liability for 'bodily injury' . . . caused, in whole or in part, by: [McGowan's] acts or omissions." The second endorsement applies "WHERE WRITTEN CONTRACT REQUIRES INDEMNIFICATION FOR LIABILITY ARISING OUT OF YOUR ONGOING OPERATIONS" to "liability arising out of [McGowan's] ongoing operations performed for that insured."

McGowan and 170 Broadway entered into a Construction Management Agreement, dated October 19, 2012 (the "CMA"). The CMA satisfies the "written contract" requirements of the additional insured endorsements. It both requires McGowan to include Carlyle and 170 Broadway as additional insureds on its general liability policy and that McGowan indemnify Carlyle and 170 Broadway for liability arising out of McGowan's operations.

Under New York law, the second requirement of each endorsement, known as "caused by. . . acts or omissions" language and "arising out of ongoing operations" language, are treated the same. In the case at bar, these requirements are satisfied for two separate reasons. First, McGowan is a direct defendant in the Underlying Action. There are allegations by the underlying plaintiff, Adam Burawski ("Burawski"), that McGowan's negligence caused his injuries. These allegations give rise to a duty to defend Carlyle and 170 Broadway. Under this theory, the duty to indemnify will be based upon whether McGowan is found at all responsible.

Second, as a separate basis for coverage, Burawski was injured in the course of the bidding process. He would not have been on the project site but for his meeting with McGowan in connection with the bidding process. Since the injury occurred to a prospective subcontractor's employee in the course of McGowan's Work[1] under the CMA, the Underlying Action is deemed as a matter of law to constitute a claim for "liability for 'bodily injury' . . . caused, in whole or in part, by: [McGowan's] acts or omissions" and for "liability arising out of [McGowan's] ongoing operations performed for" Carlyle and 170 Broadway. Old Republic thus, as a matter of law, owes Carlyle and 170 Broadway a duty to defend and a duty to indemnify.

Old Republic's "late notice" defenses are frivolous – particularly in light of the fact that it is providing a defense to McGowan, its Named Insured, and McGowan delayed longer than Carlyle and 170 Broadway in providing notice. First, there was no late notice. Carlyle and 170 Broadway provided prompt notice of the Underlying Action to Old Republic. Second, Old Republic was not prejudiced by an alleged "late notice". Prejudice is a requirement for Old Republic to sustain its "late notice" defense. Third, Old Republic waived any "late notice" defense by raising other coverage defenses but not raising "late notice" in its disclaimer letters as a reason for its denial of coverage.

There can be no dispute that, based upon the policies' respective "Other Insurance" provisions, Wausau's policy applies excess of the Old Republic Policy. Old Republic also cannot raise an issue of fact regarding the necessity and reasonableness of the defense costs sought.

STATEMENT OF FACTS

Rather than setting forth the facts and documents relevant to this motion at

[1] The term "Work" is a defined term in the CMA and includes the bidding process.

length herein, this Court is respectfully directed to the Declaration of Aaron Abraham, (the "Abraham Dec."), and the exhibits annexed thereto, the Declaration of Jason George (the "George Dec."), and the exhibits annexed thereto, and the Declaration of Marshall T. Potashner (the "Potashner Dec."), and the exhibits annexed thereto.

ARGUMENT

Point I

CARLYLE AND 170 BROADWAY QUALITY AS ADDITIONAL INSUREDS UNDER THE OLD REPUBLIC POLICY FOR THE UNDERLYING ACITON

The Old Republic Policy contains two applicable additional insured endorsements. The first applicable additional insured endorsement, entitled "Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization," provides, in relevant part, as follows:

> A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage", or "personal and advertising injury" caused, in whole or in part, by:
>
> 1. **Your acts or omissions**; or
>
> 2. **The acts or omissions of those acting on your behalf**;
>
> **In the performance of your ongoing operations for the additional insured(s)** at the location(s) designated above. (Emphasis supplied.)

(See Potashner Dec. Exhibit "15".) The Schedule included within this endorsement provides "WHERE REQUIRED BY WRITTEN CONTRACT". (See Potashner Dec. Exhibit "15".)

The second applicable additional insured endorsement, entitled "Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization", provides, in relevant part, as follows:

> **Section II- Who Is An Insured** is amended to include as an insured the person or organization shown in the Schedule, **but only with respect to liability arising out of your ongoing operations performed for that insured.** (Emphasis supplied.)

(See Potashner Dec. Exhibit "15".) The Schedule included within this endorsement provides "WHERE WRITTEN CONTRACT REQUIRES INDEMNIFICATION FOR LIABILITY ARISING OUT OF YOUR ONGOING OPERATIONS". (See Potashner Dec. Exhibit "15".)

The first element, the "written contract" requirement, is satisfied by the CMA under both endorsements. The CMA requires McGowan to obtain a Commercial General Liability policy naming Carlyle and 170 Broadway as additional insureds. In addition, the CMA requires that McGowan indemnify Carlyle and 170 Broadway for liability arising out of McGowan's ongoing operations.

The second element of the endorsements – the "caused by. . . acts or omissions" language and "arising out of ongoing operations" – is treated the same under New York law. "The phrase 'caused by' 'does not materially differ from the ... phrase, 'arising out of'." National Union Fire Ins. Co. of Pittsburgh, PA v. Greenwich Ins. Co., 103 A.D.3d 473, 474, 962 N.Y.S.2d 9, 10 (1st Dep't 2013)(quotation and citation omitted"). See also W & W Glass Sys., Inc. v. Admiral Ins. Co., 91 A.D.3d 530, 530, 937 N.Y.S.2d 28, 29 (1st Dep't 2012); Admiral Ins. Co. v. Am. Empire Surplus Lines

Ins. Co., 96 A.D.3d 585, 589, 947 N.Y.S.2d 442, 446 (1st Dep't 2012); Liberty Mut. Ins. Co. v. Zurich Am. Ins. Co., No. 11 CIV. 9357 ALC KNF, 2014 WL 1303595, at *5 (S.D.N.Y. Mar. 28, 2014). These phrases "mean originating from, incident to, or having connection with." Regal Const. Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA, 15 N.Y.3d 34, 38, 904 N.Y.S.2d 338, 341 (2010)(citation and quotation omitted). "It requires 'only that there be some causal relationship between the injury and the risk for which coverage is provided.'" Id. (quoting Maroney v. New York Cent. Mut. Fire Ins. Co., 5 N.Y.3d 467, 472, 805 N.Y.S.2d 533, 536 (2005). Negligence is not required. Strauss Painting, Inc. v. Mt. Hawley Ins. Co., 105 A.D.3d 512, 513, 963 N.Y.S.2d 197, 198 (1st Dep't 2013), aff'd as modified, No. 203, 2014 WL 6607338 (N.Y. Nov. 24, 2014)("additional insured endorsement speaks in terms of 'acts or omissions,' not negligence").

Under New York law, an additional insured is entitled to the same protection as a Named Insured. Pecker Iron Works of New York, Inc. v. Traveler's Ins. Co., 99 N.Y.2d 391, 393, 756 N.Y.S.2d 2d 822, 823 (2003).[2] "[A]n insurer's duty to defend its insured arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy." Fitzpatrick v. Am. Honda Motor Co., 78 N.Y.2d 61, 65, 571 N.Y.S.2d 672, 673-74 (1991). "[A] liability insurer has a duty to defend its insured in a pending lawsuit if the pleadings allege a covered occurrence, even though facts outside the four corners of those pleadings indicate

[2] John McCune, Vice President of Claim for Old Republic, testified that Old Republic, testified that Old Republic does not follow New York law and treats Named Insured more favorably than additional insured. (See Potashner Dec., Exhibit "17" pp. 54 & 55 – 57.)

that the claim may be meritless or not covered." Id. at 63, 571 N.Y.S.2d at 672. (1991). Thus, while facts extrinsic to the complaint may not be used by an insurer to negate a duty to defend, they may be used to give rise to a duty to defend. Id. at 63-66, 671 N.Y.S.2d at 673-74. "This standard applies equally to additional insureds and named insureds." Regal Const. Corp., 15 N.Y.3d at 37, 904 N.Y.S.2d at 340-41.

The "reasonable possibility" test is satisfied in the case at bar in two ways. First, the fact that McGowan is named in the Underlying Action as a co-defendant satisfies the "reasonable possibility" test as a matter of law. BP Air Conditioning Corp. v. One Beacon Ins. Grp., 8 N.Y.3d 708, 715, 840 N.Y.S.2d 302, 306 (2007). In the Underlying Action, Burawski alleges that McGowan "was hired to perform work at the premises located at 170 Broadway, New York, New York." (See George Dec., Exhibit "4", ¶ 20.) Burawski alleges that, on or about October 23, 2012, McGowan "was performing work at" such premises. (See George Dec., Exhibit "4", ¶ 22.) Burawski alleges that his accident of October 23, 2012 "was caused by the negligence of defendants," including McGowan. (See George Dec., Exhibit "4", ¶ 26.) These allegations form a factual and legal basis on which Old Republic might eventually be held obligated to indemnify Carlyle and 170 Broadway under the Old Republic Policy. See BP Air Conditioning, 8 N.Y.3d at 715, 840 N.Y.S.2d at 306. They certainly bring this claim within the ambit of the protection purchased. See id. Since there is a possibility that Burawski's injuries arose out of McGowan's ongoing operations performed for Carlyle and 170 Broadway, Old Republic's obligation to provide Carlyle and 170 Broadway with a defense is triggered. See id.; Wausau Underwriters Ins. Co. v. QBE Ins. Corp., 496 F.

Supp. 2d 357, 360-61 (S.D.N.Y. 2007) opinion clarified, 533 F. Supp. 2d 389 (S.D.N.Y. 2008)("The Court finds *BP Air* controlling on this question. In that Moore alleges that his injuries were caused by the negligence of, among other defendants, Kel–Tech, the named insured on the QBE policy, QBE cannot disclaim coverage of Skanska and the NYC EDC in the Underlying Action on this basis."); Chunn v. New York City Hous. Auth., 55 A.D.3d 437, 437, 866 N.Y.S.2d 145, 147 (1st Dep't 2008)("The complaint asserts that plaintiff's injury was caused, in whole or in part, by ASSI's acts or omissions with respect to the NYCHA building's systems."); City of New York v. Evanston Ins. Co., 39 A.D.3d 153, 158, 830 N.Y.S.2d 299, 303 (2d Dep't 2007).

Facts outside of the pleadings in the Underlying Action also trigger a duty to defend. McGowan was responsible for the bidding process for the project. (See Abraham Dec., Exhibit "1" pp. WAU 367, ¶ 4.6.3.1.) Burawski was at the project site on behalf of his employer, Tyco Integrated Security, LLC ("Tyco"), to meet with McGowan as part of the bidding process. (See George Dec., Exhibit "6"; see also Potashner Dec., Exhibit "16", p. KM000006; Exhibit "17" pp. 180 - 185.) Pursuant to the CMA, McGowan was responsible for site safety. McGowan was responsible for the creation and implementation of the "Safety Plan", including "initiating, maintaining and supervising all safety precautions and programs in connection with the Work, including safety of all persons and property during performance of the Work." (See Abraham Dec., Exhibit "1" pp. WAU 360.) "Work" is a defined term in the CMA and includes the bidding process. (See Abraham Dec., Exhibit "1" pp. WAU 361.) McGowan was responsible for providing "proper and safe access to and egress from any occupied areas of the Project

Site at all times." (See Abraham Dec., Exhibit "1" pp. WAU 369, ¶ 4.6.5.3.) McGowan was responsible for assigning one of its employees "whose duty shall be the prevention of accidents." (See Abraham Dec., Exhibit "1" pp. WAU 372, ¶ 4.7.1.3.) McGowan, pursuant to the CMA, agreed as follows:

> 4.7.1.5 The Construction Manager shall be **solely responsible** for **initiating, maintaining and supervising all safety precautions and programs in connection with the Work**, including safety of all persons and property during performance of the Work. This requirement shall apply continuously throughout the course of the Work and shall not be limited by normal working hours. **The Construction Manager shall take all reasonable precautions and safety measures, including those listed in the Contract Documents, for the safety of, and shall, without limitation, provide reasonable protection to prevent damage, injury or loss to**:
>
> (i) all employees of the Construction Manager and Subcontractors **and all other persons who may be affected by the Work**; . . . (Emphasis supplied.)

(See Abraham Dec., Exhibit "1" pp. WAU 372, ¶ 4.7.1.5.) The project included renovation of the entire building, including bathrooms. (See Abraham Dec., Exhibit "1" pp. WAU 442.) As such, McGowan was responsible for Burawski's safety, including while he used the bathroom. These facts outside of the complaint establish a reasonable possibility that the Underlying Action alleges liability originating from, incident to, or having connection with McGowan's operations and thus give rise to a duty to defend on Old Republic's part.

Second, the "reasonable possibility" test is satisfied here because Burawski was injured in the course of his meeting with McGowan in connection with McGowan's bidding responsibilities on the project. As a matter of New York law, if a subcontractors' employee is injured, then the conditions of the above-cited additional insured provisions in the Old Republic Policy are satisfied. Regal Const. Corp., 15 N.Y.3d at 39, 904 N.Y.S.2d at 242; National Union v. Greenwich, 103 A.D.3d 473, 962 N.Y.S.2d 9. Causation or McGowan's negligence or lack thereof is irrelevant. Id. at 474, 962 N.Y.S.2d at 10 – 11. "[F]ault is immaterial to this determination." Hunter Roberts Constr. Group, LLC v. Arch Ins. Co., 75 A.D.3d 404, 407-08, 904 N.Y.S.2d 52, 56 (1st Dep't 2010). As the New York Appellate Division has held, the "acts or omissions" requirement is satisfied where the claim in question is made by an employee of the Named Insured while performing work pursuant to the Named Insured's contract with the additional insured, and "the fact that the cause of the injury may have been the result of [an additional insured]'s negligence, or that of any other [additional insured] for that matter, is immaterial with respect to the issue of whether [the additional insured] is covered by the policy in question." Lim v. Atlas-Gem Erectors Co., 225 A.D.2d 304, 305-306, 638 N.Y.S.2d 946, 947 (1st Dep't 1996). This rule applies even if the employee is injured while using the bathroom or going to lunch. Sandy Creek Cent. Sch. Dist. v. United Nat. Ins. Co., 37 A.D.3d 812, 814, 831 N.Y.S.2d 465, 467 (2d Dep't 2007); Turner Const. Co. v. Pace Plumbing Corp., 298 A.D.2d 146, 147, 748 N.Y.S.2d 356, 357 (1st Dep't 2002).

In the case at bar, while Burawski was an employee of a prospective subcontractor of McGowan rather than an actual subcontractor of McGowan, the same reasoning for additional insured coverage applies. Burawski was on the premises in response to McGowan's request for bids on the project. He would have not been on the premises and he would not have suffered injury but for McGowan's work under the CMA. The additional insured endorsements to the Old Republic Policy address coverage in terms of "the performance of [McGowan's] ongoing operations" and in terms of "liability arising out of [McGowan's] ongoing operations." As these endorsements make clear, it is the work of the Named Insured, McGowan, not the work of any subcontractor, that is relevant to the additional insured analysis. As such, it should not matter that Tyco was not hired as a subcontractor yet. Burawski was at the project site for McGowan's performance of its work under the CMA.

Accordingly, as a matter of law, pursuant to Regal Const. Corp. and the other above-cited precedent, these undisputed facts compel the conclusion that the Underlying Action alleges liability originating from, incident to, or having connection with McGowan's work under the CMA. Old Republic thus owes Carlyle and 170 Broadway a duty to defend and duty to indemnify for the Underlying Action.

Point II

THE OLD REPUBLIC POLICY APPLIES PRIMARY AS COMPARED TO WAUSAU'S POLICY

"Where the same risk is covered by two or more policies, each of which was sold to provide the same level of coverage ... priority of coverage (or, alternatively, allocation of coverage) among the policies is determined by comparison of their respective "other insurance" clauses." Sport Rock Int'l, Inc. v. American Cas. Co. of Reading, PA, 65 A.D.3d 12, 18, 878 N.Y.S.2d 339, 344 (1st Dep't 2009); see also Fieldston Prop. Owners Assoc., Inc. v. Hermitage Ins. Co., 16 N.Y.3d 257, 264, 920 N.Y.S.2d 763, 767 (2011) (holding that courts must look to the language of the applicable policies'

"Other Insurance" provisions to determine the priority of coverage between insurers). New York courts have held that where one insurer's "Other Insurance" provision provides for primary or pro rata insurance and another insurer's "Other Insurance" provision provides for excess insurance, the insurer with the primary other insurance provision will be deemed to apply first. See Tishman Constr. Corp. v. American Mfrs. Mut. Ins. Co., 303 A.D.2d 323, 324, 757 N.Y.S.2d 535, 537 (1st Dep't 2003); Fireman's Ins. Co. of Washington, D.C. v. Federal Ins. Co., 233 A.D.2d 193, 193, 649 N.Y.S.2d 700, 700 (1st Dep't 1996), lv. denied, 90 N.Y.2d 803, 661 N.Y.S.2d 179 (1997); Maxwell v. Toys "R" US-NY Ltd. P'ship, 269 A.D.2d 503, 504, 702 N.Y.S.2d 651, 652-653 (2d Dep't 2000).

Applying this case law to the matter at bar, the Old Republic Policy applies primary as compared to Wausau's policy. The Old Republic Policy contains an "Other Insurance" provision that provides, in relevant part, as follows:

> **a. Primary Insurance**
> This insurance is primary except when Paragraph b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph c. below.

(See Potashner Dec., Exhibit "15".) No portion of Paragraph b. applies to additional insureds, such as Carlyle or 170 Broadway, under the Old Republic Policy. As such, Old Republic has an applicable primary "Other Insurance" provision.

Wausau issued a Commercial General Liability Policy, No. TBJ-Z51-290706-012, with a policy period from March 15, 2012 to March 15, 2013, to Carlyle as the first Named Insured (the "Wausau Policy"). (See George Dec., Exhibit "7".)

Carlyle and 170 Broadway are Named Insureds under the Wausau Policy. (See George Dec., Exhibit "7".) Regarding "Other Insurance" the Wausau Policy provides, in relevant part, as follows:

> a. Primary Insurance
>
> This insurance is primary except when Paragraph b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph c. below.
>
> b. Excess Insurance
>
> (1) This insurance is excess over
>
> * * *
>
> (b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.

(See George Dec., Exhibit "7".) The Wausau Policy provides that "the words 'you' and 'your' refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy." (See George Dec., Exhibit "7".) In the Wausau Policy, these words refer to Carlyle and 170 Broadway. As such, compared to the Old Republic Policy, the Wausau Policy contains an excess "Other Insurance" provision.

Where, as here, one of two applicable policies contains an excess "Other Insurance" provision and the other policy contains a primary "Other Insurance" provision, the excess provision should be given effect and the coverage under the policy containing the excess provision should not come into play until the coverage under the policy containing the primary provision has been exhausted. See Fieldston Prop. Owners, 16 N.Y.3d at 265, 920 N.Y.S.2d at 768; Tishman Constr. Corp., 303 A.D.2d at 324, 757 N.Y.S.2d at 537; Fireman's Ins. Co., 233 A.D.2d at 193, 649 N.Y.S.2d at 700; Maxwell, 269 A.D.2d at 504, 702 N.Y.S.2d at 652-653.

Accordingly, pursuant to Fieldston Prop. Owners, Tishman Constr. Corp., Maxwell, and Fireman's Ins. Co., the coverage afforded by the Wausau Policy is excess over the coverage afforded by the Old Republic Policy to Carlyle and 170 Broadway for the Underlying Action.

Point III

OLD REPUBLIC'S ALLEGED "LATE NOTICE" DEFENSE FAILS

Old Republic's "late notice" defense fails for three (3) reasons. First, there was no "late notice". Second, Old Republic cannot show prejudice, which is necessary to sustain a "late notice" defense. Third, Old Republic waived its "late notice" defense by disclaiming coverage for other reasons and not raising the "late notice" defense in its disclaimer.

A. Carlyle and 170 Broadway Timely Tendered the Underlying Action to Old Republic

Carlyle and 170 Broadway first learned of Burawski's claim on or about June 10, 2013, upon service of Burawski's original Verified Complaint in the Underlying Action. (See Abraham Dec., ¶ 7.) Sixteen (16) days later, on June 26, 2013, Aaron Abraham, Esq., personal counsel to Carlyle and 170 Broadway, sent McGowan a letter tendering both entities' defense, with the express intention and request that McGowan forward such letter to its liability insurer. (See Abraham Dec., ¶ 8, Exhibit "2".) This notice is timely as a matter of law. Integrated Const. Servs., Inc. v. Scottsdale Ins. Co., 123 A.D.3d 770, __N.Y.S.2d__ (2d Dep't 2014); In re Nationwide Ins. Co. (Bellreng), 288 A.D.2d 925, 732 N.Y.S.2d 822, 823 (4th Dep't 2001); Travelers Prop. Cas. Corp. v. Fusilli, 266 A.D.2d 48, 50, 698 N.Y.S.2d 641, 643 (1st Dep't 1999).

McGowan forwarded this tender letter to Old Republic. By July 2, 2013, less than thirty (30) days after Carlyle and 170 Broadway learned of Burawski's claim, Old Republic's claims notes reflect that Old Republic was in receipt of Mr. Abraham's June 26, 2013 letter. (See Potashner Dec., Exhibit "16", pp. KM000002 - KM000003.) Old Republic's representative witness conceded that Old Republic was indeed aware that Carlyle and 170 Broadway were seeking coverage from Old Republic as of July 2, 2013. (See Potashner Dec., Exhibit "17", pp. 30.)

Moreover, McGowan, after it was sued, delayed longer in providing notice to Old Republic. (See Potashner Dec., Exhibit "17", p. 65 - 66.) Old Republic, however, is providing a defense to McGowan and has not raised a "late notice" defense as compared to its Named Insured. (See Potashner Dec., Exhibit "17", p. 53 – 54, 55 – 57 & 66 – 67.) This course of practice by Old Republic shows that Old Republic does not consider the time period from when Carlyle and 170 Broadway first received the Underlying Action to when the suit was first tendered to be a breach of its policy terms. See Well Luck Co. v. F.C. Gerlach & Co., 421 F. Supp. 2d 533, 540 (E.D.N.Y. 2005)("Evidence of a prior course of dealing can thus establish a party's awareness of and consent to intended contractual terms.")

According, this Court should determine, based upon the indisputable facts, that there was no "late notice" by Carlyle and 170 Broadway.

B. Old Republic's "Late Notice" Defense Fails for Lack of Prejudice

New York law requires prejudice to the insurer to sustain a "late notice" defense to coverage. N.Y. Ins. Law § 3420(a)(5). N.Y. Ins. Law § 3420(a)(5) provides, in relevant part, as follows:

> No policy or contract insuring against liability for injury to person, except as provided in subsection (g) of this section, or against liability for injury to, or destruction of, property shall be issued or delivered in this state, unless it contains in substance the following provisions or provisions that are equally or more favorable to the insured and to judgment creditors so far as such provisions relate to judgment creditors:
>
> * * *
>
> (5) A provision that failure to give any notice required to be given by such policy within the time prescribed therein shall not invalidate any claim made by the insured, injured person or any other claimant, **unless the failure to provide timely notice has prejudiced the insurer**, except as provided in paragraph four of this subsection. . . (Emphasis supplied.)

N.Y. Ins. Law § 3420 (McKinney). N.Y. Ins. Law § 3420(c)(2)(A) further provides, in relevant part, as follows:

> In any action in which an insurer alleges that it was prejudiced as a result of a failure to provide timely notice, the burden of proof shall be on: (i) the insurer to prove that it has been prejudiced, if the notice was provided within two years of the time required under the policy

N.Y. Ins. Law § 3420 (McKinney). The Old Republic Policy, moreover, specifically provides as follows:

> Failure to give notice to us as required under this Coverage

> Part shall not invalidate any claim made by the insured, injured person or any other claimant, **unless the failure to provide such timely notice has prejudiced us**. However, no claim, made by the insured, injured person or other claimant will be invalidated if it shall be shown not to have been reasonably possible to give such timely notice and that notice was given **as soon as was reasonably possible** thereafter. (Emphasis supplied).

In applying the law to the case at bar, Old Republic's "late notice" defense fails because it has not and cannot show that it has suffered any prejudice. Although questioned on the subject at his Fed. R. Civ. P. 30(b)(6) deposition, Old Republic's representative witness, John McCune, was unable to identify any prejudice suffered by Old Republic as a result of any alleged "late notice". (See Potashner Dec., Exhibit "17", p. 135 - 138.) To the contrary, Old Republic was aware of the Underlying Action by July 2, 2013 – almost from inception. (See Potashner Dec., Exhibit "17", p. 43 & 45.)

Moreover, given that Old Republic denied coverage for Carlyle and 170 Broadway on other grounds, Old Republic could never establish prejudice. Prejudice can only be found to have been caused by an alleged "late notice" of claim when "the late notice materially impaired [the insurer's] ability to investigate the claim and defend against it. Atlantic Cas. Ins. Co. v. Value Waterproofing, Inc., 918 F. Supp. 2d 243, 255 (S.D.N.Y. 2013).

Here, Old Republic believed that it had enough information to deny coverage for the claim. It therefore cannot claim that its ability to investigate the claim was hindered. As such, Old Republic was not prejudiced in its claims investigation. Old Republic denied coverage, including any duty to defend Carlyle and 170 Broadway. As such, Old Republic cannot claim that its defense of the Underlying Action was prejudiced.

It was never going to provide any defense. As such, Old Republic was not prejudiced in its ability to defend against the Underlying Action.

The New York prejudice requirement is relatively new. Other States with more long-standing prejudice laws have held that an insurer cannot claim prejudice by "late notice" where it denied coverage on other grounds notwithstanding its "late notice" argument. Bay Elec. Supply, Inc. v. Travelers Lloyds Ins. Co., 61 F. Supp. 2d 611, 620 (S.D. Tex. 1999); NL Indus., Inc. v. Commercial Union Ins. Co., 926 F. Supp. 446, 456 (D.N.J. 1996)("A repudiation of liability by the insurer on the ground that the loss is not covered operates as a waiver of the notice requirements of the insurance contract and other conditions precedent"). This reasoning is sound and should be followed in New York.

Accordingly, this Court should determine that Old Republic's "late notice" fails because Old Republic has not and cannot show that it suffered any prejudice as a result of Carlyle's and 170 Broadway's alleged "late notice".

C. Old Republic Waived Its Right to a "Late Notice" Defense by Failing to Raise Such a Defense in its Disclaimer Letter

Under New York law, an insurance company that disclaims based upon lack of coverage and fails to raise a breach of a condition of coverage in its disclaimer, such as "late notice", may not later raise that breach as a basis to support its disclaimer. State of New York v. Amro Realty Corp., 936 F.2d 1420, 1432 (2d Cir. 1991)("under new York law, the act by an insurer of disclaiming on certain grounds but not others is deemed conclusive evidence of the insurer's intent to waive the unasserted grounds"); Aguiree v. City of New York, 214 A.D.2d 692, 694, 625 N.Y.S.2d 597, 599 (2d Dep't

1995)(held that "late notice" defense waived when insurer "failed to assert it in its original notice of disclaimer"); Mutual Redevelopment Houses, Inc. v. Greater New York Mut. Ins. Co., 204 A.D.145, 147, 611 N.Y.S.2d 550, 552 (1st Dep't 1994)(held that "late notice defense . . . had been waived by the insurer's failure to assert it in the disclaimer notice").[3]

In applying the waiver doctrine to the case at bar, it is clear that Old Republic waived any alleged "late notice" defense to coverage. By letter dated August 29, 2013, Gallagher Bassett Services, Inc. ("Gallagher Bassett"), as authorized claims representative of Old Republic, denied coverage to Carlyle and 170 Broadway for the Underlying Action. (See George Dec., Exhibit "9".) Old Republic's sole basis for denying coverage, including any duty to defend or indemnify, set forth in this letter was that (1) "[t]o date there has been no proof submitted to causally relate the work of McGowan to the alleged loss"; (2) "[c]onstruction had not commenced at the time of the accident; and (3) "[t]he contract between 170 Broadway and McGowan was entered on 10/24/12, after the date of loss." Old Republic did not raise a "late notice" defense to coverage. (See George Dec., Exhibit "9".) This failure constitutes a waiver of any "late notice" defense.

On January 2, 2014, Gallagher Bassett sent an additional disclaimer letter on behalf of Old Republic to Wausau for the Underlying Action. (See George Dec.,

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[3] This waiver doctrine is a common law waiver doctrine that is independent of the waiver doctrine arising under N.Y. Ins. Law § 3420(d)(2) for failure to timely disclaim. Section 3420(d)(2) only applies to claims for death or bodily injury arising from accidents in New York under liability policies issued or delivered in New York. The common law waiver doctrine applies to all policies and claims governed by New York law.

Exhibit "11".) This second disclaimer letter also fails to raise a "late notice" defense to coverage. (See George Dec., Exhibit "11".) Although such defense was already waived because it was not raised in the first disclaimer letter, this letter provides another basis for waiver of any "late notice" defense by Old Republic.

Accordingly, this Court should hold and determine that Old Republic cannot sustain a "late notice" defense to coverage.

Point IV

WAUSAU IS ENTITLED TO RECOVERY OF ITS PAST DEFENSE COSTS PLUS INTEREST

As a result of Old Republic's breach of duty to defend, Wausau is entitled to recover the expenses reasonably incurred by it in defending the Underlying Action. National Union v. Greenwich, 103 A.D.3d at 474, 962 N.Y.S.2d at 11. Wausau is also entitled to interest. Id. As this Court has stated,

> Where an insurer breaches the duty to defend, it must pay damages in the form of attorneys' fees and litigation expenses reasonably incurred by the insured in defending the underlying action. The insurer must also pay interest at a rate of nine percent from the date of each legal bill.

United Parcel Serv. v. Lexington Ins. Grp., 983 F. Supp. 2d 258, 267-68 (S.D.N.Y. 2013). Alternatively, interest may be computed "from a single reasonable intermediate date." N.Y. C.P.L.R. § 5001(c); see also Esquire Radio & Electronics, Inc. v. Montgomery Ward & Co., 804 F.2d 787, 796 (2d Cir. 1986).

In the case at bar, Wausau has established the costs reasonably incurred by it in defending the Underlying Action through submission of attorneys' fee and other invoices. It appropriately seeks recovery of interest from an intermediate date, April 1,

2014. (See George Dec., Exhibit "12".) Accordingly, this Court should award Wausau a money judgment against Old Republic in the sum of $9,898.70, plus interest at 9% per annum from April 1, 2014.

CONCLUSION

For the above-cited reasons, Wausau's motion should be granted in its entirety. The Court should grant Wausau (i) a declaration that Old Republic is required to defend and indemnify Carlyle and 170 Broadway for the claims against them in the Underlying Action; (ii) a declaration that Old Republic Policy applies on a primary basis as compared to the Wausau Policy for Carlyle and 170 Broadway for the Underlying Action; (iii) a money judgment in the sum of $9,898.70, plus interest at 9% per annum from April 1, 2014 against Old Republic, and (iv) grant Wausau the costs and disbursements of this action, together with such other and further relief as this Court deems just and proper.

Dated: New York, New York
February 4, 2015

Respectfully Submitted,

JAFFE & ASHER LLP

By: ______________________________

Marshall T. Potashner, Esq.
Spencer Marr, Esq.
Attorneys for Plaintiff
WAUSAU UNDERWRITERS
INSURANCE COMPANY
600 Third Avenue, 9th Floor
New York, New York 10016
(212) 687-3000
MPotashner@Jaffeandasher.com
SMarr@Jaffeandasher.com